IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH JAIPUR

J U D G M E N T

Jamal S/O Chotu Khan V/S Kamruddin and others

S.B. Civil First Appeal No.66/90 against the judgment and decree dated 20.2.1990 passed by Shri Madan Lal Jain, Additional District Judge, Bunei in Civil Suit No. 80/1989.

Date of Judgment ::: August 30**, 2006**

PRESENT

HON'BLE MR. JUSTICE KHEM CHAND SHARMA

Mr. K.K. Sharma for the appellant
Mr. Sanjay Mehrishi for the respondents.

BY THE COURT:

This appeal under Section 96 CPC arises out of the judgment and decree dated 20.2.1990 passed by the learned Additional District Judge, Bundi, whereby the learned Judge has decreed the plaintiffs' suit.

Plaintiffs Kamruddin and Mohd. Salim filed a suit against the defendant appellant Jamal for possession of suit house, description of which has been stated in para 1 of the plaint. The suit was filed with the allegation that the disputed house belonged to late Khwaju Khan. He passed away on 10.10.1982. He had no

surviver. Sirajuddin, father and grand father of plaintiffs No. 1 and 2 respectively and late Khwaju Khan were close friends. Sirajuddin had also passed away on 8.2.1980. It was alleged that Khwaju Khan during his life time had gifted the house in dispute to late Sirajuddin, ancestor of plaintiffs through a gift deed dated 16.9.1974 and had also given possession of the house to him, which continued to be in possession of Sirajuddin. According to the averments in the plaint, about 7 years prior to the filing of the suit the defendant appellant started living in the disputed house, inasmuch as defendant Jamal had no house of his own and therefore, about 7 years prior to the filing of suit he had requested Sirajuddin to permit him to reside in the house on account of their good friendly relations. It was agreed that the amount spent by Jamal in the up-keep of the house would be deemed to be the compensation for occupation of the house. Late Sirajuddin, ancestor of the plaintiff was residing in another personal house and late Khwaju Khan was also residing there and he continued to look after Khwaju Khan. After the death of Sirajuddin, his son and grand son failed to look after Khwaju Khan on account of

their busy schedule and that being so the defendant appellant Jamal started alluring Khwaju Khan and ultimately succeeded in his plan and Kwaju Khan started living with him. After lapse of some time, on account of some dispute having arose between Khwaju Khan and defendant appellant Jamal, Khwaju Khan tried to evict Jamal from the disputed house, but having failed to do so, Khwaju Khan filed a suit bearing No. 160/81 against the defendant appellant for eviction. After filing of this suit, Khwaju Khan died and in the absence of his legal heirs having been brought on record, the suit came to be dismissed on 15.2.1985 as having become abated.

The plaint further mentions that in the proceedings of the suit filed by Khwaju Khan, the defendant appellant in his written statement and in the statement on oath has admitted the gift made by Khwaju Khan in favour of Sirajuddin and the fact that Sirajuddin himself had kept him in his house.

The plaintiff alleged that defendant continued to assure them to vacate the disputed house but did not abide by his assurance and ultimately stated claiming himself to be the owner of the disputed house. It was

in these circumstances that the plaintiffs served a registered notice on the defendant and then, after expiry of the notice period, filed the present suit. The plaintiffs have also claimed mesne profits of Rs. 60/- per month.

The defendant appellant contested the suit by filing written statement and denied the averments made in the plaint. It has been averred that Khwaju Khan was also residing in the said house till his death and since the death of Khwaju Khan, the defendant has been in continuous possession of the disputed house. It has further been averred that Khwaju Khan had also executed a Will on 25.10.1977 in favour of the defendant thereby giving all his movable and immovable properties to defendant Jamal. According to defendant, Sirajuddin never came into possession of the dispute house and all through the defendant appellant has been in possession thereof. The mesne profits has also been denied.

On the basis of pleadings of the parties, the learned trial court framed issues and at the conclusion of trial and on hearing the counsel for the parties, the trial court vide its impugned judgment and decree, decreed the plaintiffs' suit for possession and also

granted mesne profits @ 25/- per month. Hence the present appeal.

Mr. Sharma, appearing for the appellant has challenged the findings arrived at by the trial court. Firstly it has been argued that the trial court has committed serious error in relying upon the so-called admission of the defendant in his written statement Ex.6 and in his statement Ex.7 in the earlier suit filed by Khwaju Khan. According to him, the so-called admission was made in a suit, to which the plaintiffs or Sirajuddin were not a party and therefore such admission neither could have been relied upon nor could be taken to be the admission for granting a decree of possession in favour of plaintiffs, particularly when the suit filed by Khwaju Khan was dismissed.

It was next contended that the trial court has failed to appreciate that the so-called gift made in favour of Sirajuddin had been revoked legally by Khwaju Khan and therefore, it could not be taken to be a valid gift so as to enable him to claim possession of the disputed property. That apart, it is also an admitted fact that after execution of gift deed in favour of

Sirajuddin, Khwaju Khan himself had filed a suit for possession against Jamal. Had any gift been made prior to that date, it stood revoked on account of the fact that it was not even recognised by the doner. Learned counsel further submitted that there is no other evidence with regard to the valid gift having been made by Khwaju Khan in favour of Sirajuddin. According to him, it has been proved that Khwaju Khan lived in the disputed house till he died and he was being looked after by the defendant Jamal. In these circumstances, the claim of the plaintiffs or Sirajuddin could not succeed on the basis of the alleged gift.

Mr. Sharma argued that the trial court has failed to appreciate that the pleadings in the earlier suit or the statements made in the earlier suit could not be considered to be admissions so as to enable the respondent plaintiffs to take advantage of the same in the present suit and obtain a decree for posession. The defendant Jamal is an illiterate person. Moreover, the earlier suit had been filed by Khwaju Khan against Jamal and any statement made to defeat that suit could not be used as an admission to prove Sirajuddin's title to the property, more so because Sirajuddin has not

been able to prove his title to the property separately. It is further argued that plaintiffs have to stand on their own legs and could not have taken advantage of so-called admissions made by Jamal defendant in the earlier suit which even otherwise in law could not have been used against Jamal. On this strength, learned counsel argued that trial court has wrongly relied upon the principle of estoppel in the present case.

Mr. Mehrishi, learned advocate appearing for the plaintiff respondents has supported the findings arrived at by the learned trial court and has submitted that the impugned judgment being based on proper appreciation of evidence, in its true perspective, does not call for any interference. The trial court has rightly granted decree for possession of the suit house and for mesne profits.

I have considered the rival submissions and gone through the evidence, ocular and documentary and the impugned judgment. The main thrust of the argument of Mr. Sharma, counsel for the appellants is that plaintiff respondents have not been able to prove the gift deed Ex.1 inasmuch as unless the gift is proved to

have been accepted by the donee, it cannot be treated to be a valid gift having been made by Khwaju Khan in favour of Sirajuddin and therefore, Sirajuddin cannot be said to have title over the disputed house. Much emphasis was also led on the fact that so-called admission of the appellant in the earlier suit filed by Khwaju Khan cannot legally be considered to be the admissions so as to enable the plaintiffs to take advantage of the same in the present suit, more so when the said suit was dismissed.

Khwaju Khan had filed a civil suit bearing No. 160/81 against defendant appellant Jamal, which came to be decided by the Munsiff & Judicial Magistrate, Bundi vide judgment dated 15.2.1985 (Ex.5). In that suit, appellant Jamal filed written statement Ex.6 and gave his statement, Ex.7. In para 1 at portion `C' to `D' of the `additional pleas' of the written statement the appellant has made categorical admission to the effect that `plaintiff had gifted the disputed house to Sirajuddin on 1.12.1974. That apart, in his statement Ex. 7 the defendant appellant has stated that `Khwajuji had gifted this house to Sirajuddinji. At portion `G' to `H' it has further been admitted that this house had

remained in possession of Sirajuddin after the gift. It is thus well proved that Khwaju Khan gifted the disputed house in favour of Sirajuddin and Sirajuddin, in turn, accepted the gift.

Section 122 of the Transfer of Property Act, 1882 defines `Gift', according to which “gift” is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. PW2 Bhanwar Lal, witness to the gift deed, Ex.1 has stated that Sirajuddin was present at the time when gift deed was written and that Sirajuddin had accepted the gift deed. PW3 Bajranglal, another witness to the gift deed has also stated that Sirajuddin had accepted the gift. The witness further stated that on the day of registry, Khwaju Khan had handed over possession of the disputed house to Sirajuddin and Sirajuddin had put his lock on it. PW2 Bhanwar Lal was also present at the time of handing over possession. PW4 Jamna Shanker, scribe of the gift deed has also stated that Sirajuddin had accepted the gift, the writing of which from portion `K' to `L' was written by him. The acceptance of gift

by Sirajuddun from portion K to L on the gift deed Ex.1 is in the terms: `*I, Sirajuddin S/O Shri Lukmanji Musalman resident of Bundi do hereby accept this gift and that I have taken over possession of the said house.'* The endorsement at the back of the gift deed also fortifies that Sirajuddin had accepted the gift deed.

So far second argument as regards non-admisibility of admission of the defendant appellant in the written statement and in his statement in the suit filed by Kwajuddin is concerned, suffice it to observe that the admission made by the defendant appellant in the proceedings of the suit filed by Kwaju Khan, as discussed above, is well proved. Therefore, the clear and unequivocable admission made by the defedant appellant is the best evidence. I am fortified in my view by a decision of the Apex Court in *Union of India Vs. Moksh Builders and Financiers Ltd and others* (AIR 1977 SC 409), wherein their Lordships have held as under:

> “An admission by a party is substantive evidence of the fact admited, and admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not

> and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions". (Head note B)

Again in *Thiru John Vs. Subramahamanyan* (AIR 1977 SC 1724), their Lordships of the Supreme Court have held as under:

> "It is well settled that a party's admission as defined in Secs 17 to 20, fulfilling the requirements of S. 21, Evidence Act, is substantive evidence proprio vigore. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though no conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established."

From what has been stated above, it must be concluded that late Sirajuddin became owner of the suit house by virtue of registered gift deed dated 16.9.1974 made by Khwaju Khan and accepted by him. After the gift of disputed house having been made by Khawaju Khan in favour of Sirajuddin, he was not entitled to revoke the gift and to execute the will in favour of defendant appellant on 25.10.1977 i.e. after lapse of a period of more than 3 years and therefore, the appellant cannot claim right or title over the disputed house on the

basis of a will. The trial court, in my considered view has appreciated the evidence in true perspective and has rightly decreed the suit for possession in favour of the plaintiffs who are son and grand son of Sirajuddin. The judgment and decree impugned in this appeal, therefore, call for no interference.

In the result, this appeal being devoid of merit fails and is hereby dismissed with no order as to costs.

(Khem Chand Sharma), J.

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